APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED SEPTEMBER 23, 2003

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

August Term, 2002

(Argued: June 23, 2003 Decided: September 23, 2003)

Docket No. 02-9200

WILLIAM S. MIX,

Plaintiff-Appellant,

v.

DELAWARE AND HUDSON RAILWAY COMPANY, INC., d/b/a CP Rail System,

Defendant-Appellee.

Before: WALKER, *Chief Judge*, and STRAUB and POOLER, *Circuit Judges*.

Appeal from the September 13, 2002 judgment of the United States District Court for the Northern District of New York (Norman A. Mordue, *District Judge*) granting summary judgment to the defendant.

Affirmed in Part, Vacated and Remanded in Part.

Appendix A

Pooler, *Circuit Judge.*

On June 28, 2000, William S. Mix ("Mix") filed an action against his employer, the Delaware and Hudson Railway Company, Inc., d/b/a CP Rail System ("D & H Railway"), pursuant to the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, for hearing loss he allegedly suffered during the course of his employment, between September 1973 and April 2000. The United States District Court for the Northern District of New York (Norman A. Mordue, *District Judge*) granted summary judgment to D & H Railway on the basis that Mix's suit was barred by the statute of limitations. Specifically, the district court found that Mix knew, or should have known, of his hearing loss and its cause prior to June 28, 1997, the earliest date upon which his cause of action could have accrued to fall within the three-year statute of limitations period. The district court also held that the continuing tort doctrine does not toll the statute of limitations in FELA cases. Mix now appeals that judgment.

BACKGROUND

Between September 1973 and April 2000, Mix worked for D & H Railway at various railway yards as a laborer, trainer, qualified conductor, and engineer. In November 1993, Mix consulted an otolaryngologist, Dr. Leonard Newton, concerning "ringing" in his ears. Mix concedes that, according to Dr. Newton's notes, he "complained of reduced hearing for some period of time and that it was especially notable in high pitches during the past 2-3 years." Mix also concedes that Dr. Newton's notes reported "a chronic problem with tinnitus, or ringing in his ears, which was occurring

95% of the time." Finally, Mix concedes that "the history notes that [he] was exposed to loud noises for years as the result of his employment with the railroad." During his deposition, Mix testified that he initially noticed the ringing and said, "[a]fter that my hearing just progressively got worse to the point where I'm at today." In response to the question, "At [the] time [you consulted Dr. Newton] did you have some belief that the ringing in your ear[s] and any problems you were having were related to your work?," Mix answered, "I'm going to say yes, it just kept getting worse." Moreover, Mix testified that Dr. Newton told him that he had a hearing problem.

In August 1994, Mix completed a medical history questionnaire when he renewed his engineer's license. In response to the question, "Have you ever worked on a noisy job?," Mix checked the "Yes" box and wrote "22 years [with the] Railway." In response to the question, "Have you ever been told or noticed you are hard of hearing?," Mix checked the "Yes" box and wrote "Both."[1] In response to the question, "Do you have any ringing or buzzing in your ears?," Mix checked the "Yes" box and wrote "Constant." During his deposition, Mix testified that when he wrote that he was hard of hearing, he meant that he was constantly having trouble understanding his wife. However, he testified that his answer on the application was an accurate statement. He also testified that his wife told him "all the time" that he was having trouble hearing.

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1. Although this document states that Mix suffered from "moderate hearing loss," Mix did not write this comment. It is unclear whether he ever saw the comment or learned of the diagnosis.

Appendix A

Between 1993 and 2000, Mix underwent annual hearing exams administered by both his employer and the State of New York. Mix testified that he generally did not receive the results of these hearing tests. In 1997, D & H Railway's representative called Mix to inform him that he had failed the hearing test. However, the representative subsequently called him back to inform him that her prior call was a mistake and that he should "forget that she had even called." Mix testified during his deposition that at the time of this call, he "was having the ringing, having a problem hearing," which progressively worsened. Mix continued to work for D & H Railway until April 2000, when he failed his most recent hearing exam and was dismissed from his position.

Mix filed the instant suit June 28, 2000, pursuant to the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* ("FELA"). Mix alleged that his hearing loss was caused by his exposure to noisy working conditions and that D & H Railway did not provide him with a reasonably safe working environment. Mix alleged that although D & H Railway required employees to wear earplugs in certain noisy areas, D & H Railway should have instructed employees to wear earplugs throughout the entire railroad yard. Mix alleged that D & H Railway failed to make earplugs available at all times during his employment and that he complained to management when they were not available. Mix also alleged that he suffered hearing damage, despite the fact that he generally wore ear protection while working as an engineer.

The United States District Court for the Northern District of New York (Norman A. Mordue, *District Judge*) granted summary judgment to D & H Railway on the basis that Mix's

suit was barred by the statute of limitations. Specifically, the district court found that Mix knew, or should have known, of his hearing loss and its cause prior to June 28, 1997, the earliest date upon which his cause of action could have accrued to fall within the three-year statute of limitations period. The district court also held that the continuing tort doctrine does not toll the statute of limitations in FELA cases. Mix now appeals that judgment.

LEGAL STANDARDS

The Federal Employers' Liability Act provides that "[n]o action shall be maintained . . . unless commenced within three years from the day the cause of action accrued." 45 U.S.C. § 56. With respect to "gradual injuries"—those which occur gradually, over long periods of time, due to ongoing exposure to harmful working conditions—the Supreme Court has adopted a "discovery rule" and held that the FELA statute of limitations accrues when the injury "manifest [s]" itself, taking into account whether the plaintiff "should have known" of his injury. *Urie v. Thompson,* 337 U.S. 163, 170 (1949). The Court subsequently applied this discovery rule to claims under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 ("FTCA"), holding that a tort claim does not accrue until the plaintiff discovers both his injury and its cause, but that accrual does not await awareness by the plaintiff that his injury was negligently inflicted. *See United States v. Kubrick,* 444 U.S. 111, 120-25 (1979). Although this discovery rule was refined in the context of FTCA cases, the genesis of the rule can be traced to *Urie* and courts apply it to FELA cases. *See, e.g., Campbell v. Grand Trunk W. R.R. Co.,* 238 F.3d 772, 775 (6th Cir.2001);

Fries v. Chicago & Northwestern Transp. Co., 909 F.2d 1092, 1095-96 (7th Cir.1990); *Albert v. Maine Cent. R.R. Co.*, 905 F.2d 541, 543- 44 (1st Cir.1990); *Townley v. Norfolk & W. R.R. Co.*, 887 F.2d 498, 500-01 (4th Cir.1989); *DuBose v. Kansas City S. Ry. Co.*, 729 F.2d 1026, 1029-30 (5th Cir.1984). Thus, an FELA action accrues when "the plaintiff in the exercise of reasonable diligence knows both the existence and the cause of his injury." *Ulrich v. Veterans Admin. Hosp.*, 853 F.2d 1078, 1080 (2d Cir.1988) (citing *Kubrick*, 444 U.S. at 122-25).

DISCUSSION

I. Mix's Injuries Prior to June 28, 1997

We affirm the district court's decision to grant summary judgment to D & H Railway, to the extent that Mix's claim seeks to recover for injuries he suffered prior to June 28, 1997. The undisputed facts establish that Mix knew, or should have known, of the existence of his injury prior to that date. Mix consulted Dr. Newton in November 1993, and he concedes that the doctor's notes indicate that he "complained of reduced hearing for some period of time." Less than one year later, Mix completed an application to renew his engineer's license. In response to the question, "Have you ever been told or noticed you are hard of hearing?," Mix checked the "Yes" box and wrote "Both." During his deposition, Mix testified that he initially noticed ringing in his ears, prompting his visit to Dr. Newton in 1993, after which his "hearing just progressively got worse."

Mix argues that he consulted Dr. Newton for a distinct injury. Specifically, he argues that "[t]he problems with tinnitus and hearing loss are separate and distinct medical conditions." Even accepting the purported distinction between tinnitus and hearing loss, the record reflects that Mix complained of "hearing loss" prior to June 28, 1997. Specifically, he complained of "reduced hearing" to Dr. Newton in 1993 and admitted to being "hard of hearing" in 1994. He also testified that his hearing "progressively got worse" after his initial visit to Dr. Newton. Mix also argues that he provided contradictory testimony concerning when he had notice of his hearing loss. He cites only one portion of his deposition transcript in which he said the following:

> Q. Do you remember telling the healthcare provider back in 1994 that you had been told that you were hard of hearing or that you've noticed being hard of hearing?
>
> A. Yes, my wife tells me all the time.
>
> Q. What about back in 1994, were you aware of it then?
>
> A. Somewhat, not to the extent that it is right now.
>
> Q. When you say, "somewhat," you had noticed that you were hard of hearing back in 1994?

A. This is—how can I put this? This is like my wife, she's constantly saying things to me and I misunderstand what she's saying.

However, none of this testimony contradicts evidence that Mix knew, or should have known, of his hearing loss prior to June 28, 1997. Rather, it supports the district court's conclusion on this issue. Mix admitted that his wife told him as early as 1994 that he was "hard of hearing." Mix also admitted that, as early as 1994, he was "somewhat" aware of his hearing loss.

Finally, Mix argues that "[t]he record of that office visit makes no mention whether hearing loss was objectively diagnosed or that any actual findings were documented." Regardless of whether he received an actual diagnosis, undisputed facts indicate that Mix knew that he was having problems with his hearing. The fact that Mix may not have had actual knowledge of his medical diagnosis would not relieve him of his duty of exercising due diligence based upon strong indications that he did, in fact, have an injury.

There is also no genuine issue of material fact that Mix knew, or should have known, that his hearing loss was caused by noisy conditions at his workplace. Mix testified that at the time he consulted Dr. Newton, he had "some belief" that his hearing problems were related to his work. Specifically, Mix testified as follows:

Q. At that time did you have some belief that the ringing in your ear[s] and any problems you were having were related to your work?

A. I'm going to say yes, it just kept getting worse.

Mix recognized the need to wear earplugs in noisy areas. He testified that the noise levels at the railroad yard were so high that all employees should have been required to wear earplugs in every area. Moreover, he testified that he complained to management when earplugs were not available. Thus, the record is clear that Mix recognized the connection between his noisy working conditions and his hearing loss.

In sum, based upon uncontroverted facts, there can be no dispute that Mix knew, or should have known, of both the existence and cause of his injury prior to June 28, 1997. On this basis, we affirm the district court's decision to grant summary judgment to D & H Railway on Mix's claim, to the extent that he seeks to recover for injuries he suffered prior to that date.

II. Mix's Injuries Between June 28, 1997, and June 28, 2000

We now join other circuits in considering whether a plaintiff complaining of a gradual injury may assert a cause of action based upon injuries sustained during the three-year period preceding the filing of his FELA claim. Despite the apparent simplicity of the discovery rule, its application does not necessarily function effectively in the context of gradual injuries. Unlike traumatic injuries, the existence and causes of gradual injuries are often elusive. Whereas a longshoreman whose leg is crushed by a container shipment immediately knows of both the existence and cause of his injury, a white-collar worker who feels slight, intermittent pain in her wrist may not know for many years that she has carpal tunnel

syndrome as a result of her working conditions. Even a plaintiff who is aware of the existence and cause of his gradual injury may not have an adequate remedy. A plaintiff, such as Mix, may be faced with the choice of filing suit prematurely, which may preclude a full recovery and could result in him being declared unfit to work, or waiting until the gradual injury becomes serious enough to render him unfit to work, in which case the claim may be barred as untimely. Either result would be inequitable and undermine the spirit of the FELA, which we must interpret broadly to effectuate its remedial purpose. *See, e.g., Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532, 543 (1994).

For these reasons, we decline to join the following circuit decisions to the extent that they can be read as necessarily barring FELA claims based upon injuries suffered during the three-year period of limitations. *See, e.g., White v. Mercury Marine, Div. of Brunswick, Inc.,* 129 F.3d 1428, 1432-33 (11th Cir.1997) (analyzing analogous maritime law's statute of limitations); *Fries v. Chicago & Northwestern Transp. Co.,* 909 F.2d 1092, 1095 (7th Cir.1990) (holding that "[t]he tolling permitted by *Urie* only extends the limitations period to the date when the injury manifests itself, not beyond"). *See also Matson v. Burlington N. Santa Fe R.R.,* 240 F.3d 1233, 1235-36 (10th Cir.2001); *Bealer v. Missouri Pac. R.R. Co.,* 951 F.2d 38, 40 (5th Cir.1991) (per curiam); *Albert v. Maine Cent. R.R. Co.,* 905 F.2d 541, 543- 44 (1st Cir.1990); *Townley v. Norfolk & W. Ry. Co.,* 887 F.2d 498, 501 (4th Cir.1989).

Mix argues that we should toll the statute of limitations based upon the continuing tort doctrine, which provides that,

in certain tort cases involving continuous or repeated injuries, the statute of limitations accrues upon the date of the last injury and that the plaintiff may recover for the entire period of the employer's negligence, provided that an act contributing to the claim occurs within the filing period. *See National R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 117 (2002). However, applying this doctrine in an FELA case would be inconsistent with the discovery rule, as it would permit plaintiffs to recover for injuries whose existence and cause was known over three years prior to filing suit. The Supreme Court has rejected the notion that "each intake of dusty breath is a fresh 'cause of action.'" *Urie,* 337 U.S. at 170. Most courts to consider this issue have refused to apply the continuing tort doctrine to FELA cases, and the only court to endorse this approach did so by misinterpreting *Fowkes v. Pennsylvania R.R. Co.,* 264 F.2d 397 (3d Cir.1959).[2]

At oral argument, the parties addressed the applicability of *National R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 117 (2002), which applied the continuing tort doctrine to

2. In *Fletcher v. Union Pac. R.R. Co.,* 621 F.2d 902 (8th Cir.1980), the Eighth Circuit cited *Fowkes* for the proposition that the claim accrues when the tortious conduct ceases, in a case where the plaintiff knew of the existence and cause of his injuries. *Id.* at 908. However, the Third Circuit tolled the statute of limitations in *Fowkes* because "the jury found specifically that the plaintiff was unaware that the physical condition for which he sought damages had existed for more than three years before the suit had been filed." *Kichline v. Consolidated Rail Corp.,* 800 F.2d 356, 359 (3d Cir.1986). The Third Circuit also recognized that the cause of action accrues once the plaintiff discovers the existence and cause of his injury. *Id.* at 360 ("On discovering an injury and its cause, a claimant must choose to sue or forego that remedy.").

hostile work environment claims under Title VII. However, we recognize a distinction between Title VII and the FELA that supports applying the continuing tort doctrine in certain Title VII cases, but not in FELA cases. In Title VII cases, the statute of limitations begins to run when "the alleged unlawful employment practice occur[s]." *Morgan,* 536 U.S. at 109 (citing 42 U.S.C. § 2000e-5(e)(1) (emphasis omitted)). While "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify," the Court recognized that "[h]ostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct." *Id.* at 114-151. As "the entire hostile work environment encompasses a single unlawful employment practice," the Court recognized that "an unlawful employment practice has 'occurred,' even if it is still occurring." *Id.* at 117. For this reason, a plaintiff may assert a hostile work environment claim under Title VII if one predicate act occurs within the filing period, which is consistent with Title VII's requirement that the statute of limitations begins to run once the act has "occurred." However, since all of the predicate acts are part of a single claim, "the entire time period of the hostile environment may be considered by a court for the purposes of determining liability." *Id.*

Whereas Title VII utilizes an "occurrence-based" trigger for the statute of limitations, the FELA has a "discovery-based" trigger. As discussed, an FELA claim accrues once the plaintiff knows, or should have known, of both the existence and cause of his injury. As the plaintiff's knowledge, in the exercise of due diligence, is dispositive, it is not relevant whether a single incident of tortious conduct

occurs within the filing period. Once the plaintiff is aware of his injury and its cause, the mere fact that the tortious conduct—of which he is aware—is ongoing does not provide a basis for tolling or restarting the statute of limitations.[3] Accordingly, we reject the argument that the continuing tort doctrine tolls the statute of limitations in FELA cases.

Mix argues that we should adopt the approach of the Third Circuit, which permits a distinct cause of action under the FELA for "aggravation" of an existing, gradual injury that occurs during the three-year period preceding the suit. *See Kichline v. Consolidated Rail Corp.*, 800 F.2d 356, 361 (3d Cir.1986). We reject this approach, to the extent the claim for aggravation is based upon negligence of which the plaintiff was aware over three years before the suit. Were we

3. Mix also relies upon *Page v. United States*, 729 F.2d 818 (D.C.Cir.1984), in which a plaintiff asserted medical malpractice claims against the Veterans Administration, pursuant to the FTCA. The court held that the statute of limitations would not accrue until the tortious conduct ceased. *Id.* at 821-23. However, in *Ulrich v. Veterans Admin. Hosp.*, 853 F.2d 1078 (2d Cir.1988), we held that medical malpractice cases are sufficiently unique to warrant tolling the statute of limitations. "[A] number of courts—including our own—have recognized that where the plaintiff is in the continuing care of the negligent actor for the same injury out of which the FTCA cause of action arose, the statute of limitations may be tolled under certain circumstances until the end of the course of treatment." *Id.* at 1080. The rule exists because: 1) "it is not reasonable to expect a patient who is in the continuing care of a doctor to discover that the doctor's acts may be the cause of his injuries," *id.;* and 2) "it [is] absurd to expect a patient being treated by a doctor or hospital to interrupt corrective treatment by instituting suit against either while under their continuing care." *Id.* at 1081. The same rationale does not apply in an FELA case for work-related injuries.

to allow such a claim for aggravation, a plaintiff could recover for an injury whose existence and cause was known over three years preceding the suit, in contravention of the Supreme Court's holdings in *Urie v. Thompson,* 337 U.S. 163, 170 (1949) and *United States v. Kubrick,* 444 U.S. 111, 122-25 (1979).

Instead, we rely upon the plain language of the discovery rule, which provides that the statute of limitations accrues upon the plaintiff's discovery of *both* his injury and its cause. Accordingly, a plaintiff can recover for injuries suffered during the three-year period preceding the suit, if these injuries are sufficiently distinct from those previously suffered. A plaintiff can also recover for aggravation to existing injuries, provided that the aggravation was caused by a distinct act of negligence whose existence and relationship to the injury was unknown prior to the three-year period preceding the suit.

A. A Distinct Injury

A plaintiff may recover for distinct injuries he suffers during the three-year period preceding the suit. Had Mix proffered sufficient evidence to support his argument that "tinnitus" and "hearing loss" are separate conditions, and that he began to suffer from the latter affliction only during the statute of limitations period, we would have vacated the district court's judgment on this basis. However, the undisputed record is clear that Mix suffered from "hearing loss" as early as 1993.

Regardless, Mix's argument requires us to determine how distinct the two injuries must be—or more aptly, how similar the injuries may be—in order to assert a claim on this basis. In an effort to craft a bright-line rule, we rely upon the Sixth Circuit's holding in *Fonseca v. Consolidated Rail Corp.*, 246 F.3d 585 (6th Cir.2001). In that case, the plaintiff, a railroad laborer who worked with various hand tools between 1967 and 1997, would experience pain in his hands, but the pain always subsided within a day. *Id.* at 587. Sometime between 1996 and 1997, however, the pain became permanent, and the plaintiff filed suit under the FELA. *Id.* The Sixth Circuit distinguished between the "temporary pain" the plaintiff experienced for twenty-seven years and the "cumulative injury" that resulted in permanent, continuous pain, concluding that the "accumulated effects" of exposure to harmful working conditions may comprise an injury distinct from the temporary symptoms he previously experienced. *Id.* at 590-91. "[I]f the continuous pain and numbness that developed in the mid 1990s is a distinct injury from the normal discomforts of a day's work, . . . then [the plaintiff's] cause of action may survive the statute of limitations defense." *Id.* at 590.

We adopt the same rule and hold that a plaintiff may maintain a claim for "accumulation" if he proffers evidence suggesting that his initial symptoms were temporary in nature, and based upon their accumulation, became permanent injuries only during the three-year period preceding his suit. In essence, we recognize that temporary injuries may be sufficiently distinct from permanent injuries to preclude summary judgment, as an employee is "injured only when the *accumulated* effects of the [continuing

exposure] manifest themselves." *Urie,* 337 U.S. at 170 (emphasis added) (citations omitted). Thus, Mix can survive summary judgment if he proffers evidence that, prior to June 28, 1997, his tinnitus and hearing loss caused only temporary discomfort as a result of his exposure to noisy working conditions, and that these symptoms did not manifest themselves as a cumulative, permanent injury until the three-year period preceding this action.

B. A Distinct Cause

We also recognize that a plaintiff may assert a claim for "aggravation" of an existing injury, provided there is evidence that the additional damage was caused by a distinct act of negligence of which the plaintiff became aware only during the three-year period preceding his suit. *See Consolidated Rail Corp.,* 512 U.S. at 543 (recognizing that the basis of the employer's liability under the FELA is his negligence). To hold otherwise would extinguish a claim stemming from an independent act of negligence before it even accrues under the discovery rule, and we cannot view the prior claim as having this effect merely because its predicate act of negligence caused or was aggravated by the same injury as a subsequent, distinct act of negligence. *Cf. Lawlor v. National Screen Serv. Corp.,* 349 U.S. 322, 328, (1955) (recognizing that a previously existing actionable claim or judgment "cannot be given the effect of extinguishing claims which did not even then exist"). Therefore, a plaintiff who alleges that a distinct act of negligence—of which he was not aware over three years before filing suit— aggravated his existing injury may seek to recover for additional damages he allegedly suffered as a result of the intervening cause. In the

instant case, however, Mix never argued that his hearing loss stemmed from two distinct causes. D & H Railway's continuing failure to provide ear plugs by itself would not qualify as a "distinct cause." Finally, we emphasize that if there was a distinct cause or injury within the statute of limitations period, the plaintiff may collect damages only for the distinct injury or the degree of the injury resulting from the distinct cause.

CONCLUSION

Based upon the foregoing, the judgment of the United States District Court for the Northern District of New York is affirmed in part and vacated and remanded in part so that the district court may reconsider the motion in a manner consistent with this opinion and undertake additional fact finding, if necessary.

APPENDIX B — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK FILED SEPTEMBER 12, 2002

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

00-CV-1020
(NAM/GJD)

WILLIAM S. MIX,

Plaintiff,

DELAWARE AND HUDSON RAILWAY COMPANY, INC. d/b/a CP RAIL SYSTEM,

Defendant.

NORMAN A. MORDUE, District Judge

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Before the Court is a motion for summary judgment by defendant Delaware and Hudson Railway Co., Inc. d/b/a C P Rail System ("Delaware and Hudson" or "defendant")

requesting dismissal of this action based principally upon the Federal Employers' Liability Act ("FELA"), codified at 45 U.S.C. § 51 *et seq.* Defendant argues this action is barred by FELA's three year statute of limitations. Plaintiff William S. Mix ("plaintiff") opposes this motion.

II. FACTUAL BACKGROUND

According to plaintiff, the facts are as follows: Plaintiff worked for defendant in the Binghamton, New York railroad yard[1] in various capacities, including laborer, trainer, qualified conductor, and engineer, from September 1973 until April 2000, when he was found to be "unqualified" to work due to hearing loss.

Plaintiff avers that throughout his employment, he worked between five and twelve hours per day, and was exposed to "continuous and intermittent" noise which contributed to his hearing loss. In his answers to interrogatories, plaintiff asserts that the source of this noise was engine operations in the railroad yard, including, air hoses, retarders, engine acceleration and deceleration, engine running at speed, engine idling, braking noises, and cars banging together and coupling.

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1. Plaintiff testified that he worked in defendant's Oneonta, New York railroad yard for four years in the late 1970s, and in defendant's Saratoga, New York railroad yard for approximately six months in 1992 or 1993.

Appendix B

Plaintiff testified that Delaware and Hudson maintained a "hearing protection policy and procedure." Plaintiff stated that in 1992 or 1993, defendant held safety classes, during which employees were instructed to use, and shown videos regarding, hearing protection. Plaintiff averred that these classes were discontinued, but that defendant placed signs around the railroad yard regarding hearing protection. During his deposition, plaintiff identified a "division notice" which contained information regarding defendant's hearing protection policy and procedure and directed employees to wear hearing protection (foam earplugs) when in certain areas of the railroad yard and while operating specific machinery. Plaintiff asserted that he was required to read this notice daily and have it in his possession while working. Plaintiff stated that although the policy did not require employees to wear earplugs in all areas, the noise level in Binghamton was so high that earplugs were necessary everywhere, including the lunch room. Plaintiff further averred that he wore earplugs while working, but that there were "quite a few" times when earplugs were not available. Plaintiff stated that in such situations, he would complain to management, but that it would be two to three weeks before earplugs were again available.

Plaintiff testified that in 1993 he began to experience ringing in his ears. On November 12, 1993, plaintiff went to

see Leonard Newton, M.D., an otolaryngologist.[2] At his deposition, plaintiff testified that he saw Dr. Newton regarding the ringing in his ears, but was unable to recall whether he and Dr. Newton discussed hearing loss, heating amplification, hearing protection, noise at work, or any relation between his hearing condition and work. The history/ complaint section of Dr. Newton's notes dated November 12, 1993, contain an arrow painting downward next to the word "hearing," and state: "esp - high pitched esp last 2-3 years", "noise exposure x yrs - noise protect x 1 yr". Dr. Newton's notes also indicate that "amplification" was discussed. Plaintiff stated in his deposition testimony that he believed the ringing in his ears, or "tinnitus," was related to his work. Plaintiff also testified that his hearing continued to worsen over the next few years.

Plaintiff stated that Delaware and Hudson and the New York State Department of Transportation required him to undergo an annual physical examination and hearing test. On August 18, 1994, he gave and signed a medical history in connection his annual examination which contained questions regarding plaintiff's hearing and noise exposure. In response to question 3, "Have you ever worked on a noisy job?" plaintiff stated "22 yrs . . . Railway" and checked "YES".

2. Otolaryngology is defined in the Oxford English Dictionary as: "The branch of medicine concerned with the ear and the larynx; also often used to include the nose."

Appendix B

In response to question 6, "Have you ever been told or noticed you are hard of hearing?" plaintiff stated "Both" and checked "YES". When confronted with these responses during his deposition, plaintiff stated that his response to question 6 was accurate and that he was "somewhat" aware that he was hard of hearing in 1994, but "not to the extent that it is right now" and explained "This is — how can I put this? This is like my wife, she's constantly saying things to me and I misunderstand what she's saying."

Plaintiff testified that during 1994 and 1995, his hearing worsened, to wit, he was "misunderstanding what people say. Having to repeal instructions. Having problems with synonyms, woods that sound alike[,]" and that his hearing, became "terribly worse" in the last three to five years of his employment. Plaintiff averred that the railroad yard became noisier during the last three to five years of his employment, and attributed this change to the old age of the engines in the railroad yard, which, he explained, were noisier than newer engines.

In April 2000, following the annual physical examination required by both his employer and the Department of Transportation, plaintiff was notified that he had failed the hearing test and was "unqualified" to work.

Appendix B

Plaintiff filed a complaint on June 28, 2000, alleging that he sustained hearing loss because of the negligence of his employer, Delaware and Hudson. Thereafter, defendant moved for summary judgment arguing that plaintiff knew or should have known of his hearing loss and its cause prior to June 28, 1997, the latest date on which plaintiff's cause of action could have accrued to fall within FELA's three year statute of limitations.

III. DISCUSSION

A. *Summary Judgment Standard*

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). Substantive law determines which facts are material; that is, which facts might affect the outcome of the suit under the governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 258 (1986). Irrelevant or unnecessary facts do not preclude summary judgment, even when they are in dispute. *See id.* The moving party bears the initial burden of establishing that there is no genuine issue of material fact to be decided. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Indeed, "where the nonmovant will bear the ultimate burden of proof at trial on an issue, the moving party's burden under Rule 56 will be satisfied if he can point to an absence

of evidence to support an essential element of the non-moving party's claim." *Brady v. Town of Colchester,* 863 F.2d 205, 210-11 (2d Cir. 1988). "Once the movant has discharged his duty, the onus shifts to the nomnovant and, once it has, the need to respond with specific facts is well established." *Frito-Lay, Inc. v. Willoughby,* 863 F.2d 1029, 1032 (D.C. Cir. 1988); *see Celotex,* 477 U.S. at 324. Fed. R. Civ. P. 56(e) further requires that, when an opposing party files affidavits, the affidavits must be drawn from personal knowledge.

Although the trial court must resolve all ambiguities and draw all inferences in favor of that party against whom summary judgment is sought, *see Ramseur v. Chase Manhattan Bank,* 865 F.2d 460, 465 (2d Cir. 1989); *Eastway Constr. Corp. v. City of New York,* 762 F.2d 243, 249 (2d Cir. 1985), the motion will not be defeated by a non-movant who raises merely "metaphysical doubt" concerning the facts or who only offers conjecture or surmise. *See Delaware & H. R. Co. v. Consolidated Rail Corp.,* 902 F.2d 174, 178 (2d Cir. 1990) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986)). Indeed, the nonmoving party's opposition may not rest on mere denials of the moving party's pleading, but "must set forth specific facts showing there is a genuine issue for trial." *See* Fed. R. Civ. P. 56(e). It is with these considerations in mind that the Court addresses defendant's motion for summary judgment.

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B. *FELA's Statute of Limitations*

FELA provides that "[n]o action shall be maintained under this chapter unless commenced within three-years from the day the cause of action accrued." *See* 45 U.S.C. § 56. In *Urie v. Thompson,* the Supreme Court held that when an injury develops over time as a result of continuous exposure to a harmful condition, rather than on a specific day, accrual occurs upon the plaintiffs discovery of both the injury and its cause. *See* 337 U.S. 163, 170 (1949) (when "no specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves."). The Court addressed this "discovery" rule again in *United States v. Kubrick,* and held that once a plaintiff possesses the facts of his or her injury and its cause, the action accrues regardless of whether the plaintiff is aware that his injury was negligently afflicted. 444 U.S. 111, 120 n.7 (1979) (Federal Tort Claims Act ("FTCA") claim); *see also Anthony v. Consolidated Rail Corp.,* No. CIVA96-CV-1643, 1998 WL 696288, *4 (Sept. 30, 1998) (noting that "[t]he same analysis applies in the context of a FELA action.") (citing *inter alia Puthe v. Exxon Shipping Co.,* 802 F. Supp. 819, 829 (E.D.N.Y. 1992, *affd,* 2 F.3d 480 (2d Cir. 1993)). In *Ulrich v. Veterans*

Admin. Hosp., the Second Circuit stated that under the discovery rule, a claim is deemed to have accrued "when the plaintiff in the exercise of reasonable diligence knows both the existence and the cause of his injury." 853 F.2d 1078, 1080 (2d Cir. 1988) (FTCA) (citing *Kubrick,* 444 U.S. at 122-25). Thus, "'[b]oth components require an objective inquiry into when the plaintiff knew or should have known, in the exercise of reasonable diligence, the essential facts of injury and cause.'" *Anthony,* 1998 WL 696288 at (quoting *Fries v. Chicago & Northwestern Transp. Co.,* 909 F.2d 1092, 1095 (7th Cir. 1990)). In this case, plaintiff filed his claim on June 28, 2000, therefore, if he knew or should have known of his hearing loss and its cause prior to June 28, 1997, his claim is untimely.

Defendant argues that plaintiff's deposition testimony illustrates that he was aware of his hearing loss and its cause as early as 1993 when he went to see Dr. Newton for ringing in his ears, and, as demonstrated by plaintiff's medical history form dated August 18, 1994, in which he responded that he had worked a noisy job for twenty-two years, and that he had been told and had noticed he was hard of hearing, not later than 1994. Defendant therefore asserts that plaintiff's action is barred by FELA's three year statute of limitations because his action accrued in 1994, but was not commenced until June 28, 2000, approximately six years later.

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Plaintiff opposes defendant's motion for summary judgment arguing that tinnitus, which was the basis for his visit to Dr. Newton in 1993, and hearing loss, are two distinct conditions, the latter of which he does not recall being aware of in 1993. Plaintiff further contends that his deposition testimony shows that he had difficulty remembering the circumstances surrounding his visit to Dr. Newton, other than that it was for ringing in his ears, and that any inconsistency in his testimony regarding this visit evidences a triable issue of fact as to whether plaintiff knew of hearing loss in 1993. Alternatively, plaintiff asserts that even assuming he knew of his injury and its cause prior to 1997, his action is not barred by the three year statute of limitations because his hearing loss was significantly aggravated by continuous exposure to noise at the railroad yard between 1997 and 2000.

The Court finds that even viewing the facts in the light most favorable to plaintiff, the record demonstrates that plaintiff knew, or in the exercise of reasonable diligence, should have known of his hearing loss and its cause not later than 1994.[3]

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3. Because, as discussed above, plaintiff's deposition testimony shows that he had the necessary facts to conclude that some type of hearing loss existed in 1994, the Court need not determine whether there is a genuine issue of material fact as to whether tinnitus and hearing loss are distinct injuries, and whether plaintiff knew or should have known that he was suffering hearing loss in 1993, when he sought help from Dr. Newton.

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1. Knowledge of Injury

On August 18, 1994, plaintiff signed a medical history form in which he indicated that he had been told and had noticed that he was hard of hearing. Plaintiff reaffirmed the accuracy of this statement when asked about it during his deposition, explaining that his wife would "constantly" tell him that he misunderstood what she was saying.[4] Plaintiff

4. In his deposition, plaintiff testified as follows:

Q. - Now, there appears to be some type of medical history that you apparently gave and signed. Question number six says, have you ever been told or noticed you are hard of hearing? And there's something written both after that and the question is answered yes.

Do you remember telling the healthcare provider back in 1994 that you had been told that you were hard of hearing or that you've noticed being hard of hearing?

A. - Yes, my wife tells me all the time.

Q. - What about back in 1994, were you aware of it then?

A. - Somewhat, not to the extent that it is right now.

(Cont'd)

also testified that during 1994 and 1995, his hearing worsened, stating that he was "misunderstanding what people say. Having to repeat instructions. Having problems with synonyms, words that sound alike."

Plaintiff argues that he cannot be charged with knowledge of his hearing loss because he was not told by defendant or any medical source that he had sustained hearing loss until April 2000, when defendant advised him that he had failed a hearing test. Additionally, plaintiff argues that in any event, his condition was not disabling until in or about April 2000. Plaintiff's argument is without merit. Under the discovery rule, a plaintiff is deemed to have knowledge of an injury

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(Cont'd)

Q. - When you say, "somewhat," you had noticed that you were hard of hearing back in 1994?

A. - This is . . . how can I put this? This is like my wife, she's constantly saying things to me and I misunderstand what she's saying.

Q. - So, what I'm trying to ask is: Is this answer that you had both noticed that you were hard of hearing and you've been told prior to November - or August of 1994, is that an accurate statement?

A. - Yes.

Pltf's Dep. Tr. pp. 47-48

regardless of whether it has been affirmatively diagnosed or reached its "maximum severity" if, in the exercise of reasonable diligence, plaintiff possessed enough facts to allow him to discover that he had an injury. *See Fries,* 909 F.2d at 1096 (the discovery rule imposes an affirmative duty on an individual experiencing symptoms "to investigate both the injury and any suspect cause.") (citing *Kubrick,* 444 U.S. at 123); *Anthony,* 1998 WL 696288 at * 5 (once aware-of symptoms, the plaintiff has a duty to investigate an injury and seek a diagnosis).

Here, the evidence shows that plaintiff was aware that he was hard of hearing not later than August 18, 1994. Consequently, under the discovery rule, plaintiff had a duty to investigate whether his symptoms were the result of a physical injury, and to seek a diagnosis.

2. Knowledge of Cause

Likewise, plaintiff knew or, in the exercise of reasonable diligence, should have known that his hearing loss was caused by exposure to loud noises at his workplace. Indeed, plaintiff does not suggest in his deposition testimony or elsewhere, that he ever believed his hearing loss was caused by anything else. Plaintiff indicated on the medical history form dated August 18, 1994, that he had worked in a "noisy" job for

twenty two years, and asserted in his deposition testimony that the noise in the railroad yard increased during the last three to five years of his employment.

Further, plaintiff's deposition testimony shows that he was aware in his "late-20s" that exposure to loud noises, without hearing protection, could "damage" his ears. Plaintiff testified that he was aware of Delaware and Hudson's hearing protection policy and procedure, safety classes and videos, and stated that he was required to read defendant's "division notice" regarding hearing protection daily and keep it on his person during working hours. Plaintiff averred that he believed that the noise levels throughout the railroad yard were so high that defendant should have required employees to wear earplugs in every area, not just in areas where the noise reached certain levels. Plaintiff also testified that he would complain to management when earplugs were not available. Therefore, based on the above, the Court finds that plaintiff possessed sufficient facts, prior to 1997, to enable him, in the exercise of reasonable diligence, to conclude that his hearing loss was caused by exposure to noise at Delaware and Hudson. *See Anthony,* 1998 WL 696288 at *5 (finding that the plaintiff's knowledge that exposure to loud noise could cause hearing loss, training regarding hearing protection, use of earplugs, complaints to supervisors regarding exposure to loud noises at the railroad, and inability to attribute his hearing loss to any other cause demonstrated

that he possessed sufficient facts to conclude, in the exercise of reasonable diligence, that his hearing loss was caused by exposure to noise at the workplace).

3. Continuing Tort Doctrine

Alternatively, plaintiff argues that even assuming he knew or should of known of his injury and its cause under the discovery rule, the statute of limitations does not bar this action because plaintiff's hearing condition worsened significantly between 1997 and 2000. Plaintiff cites *Kichline v. Consolidated Rail Corp.*, to support his argument that the statute of limitations is tolled by his continuous exposure to defendant's allegedly tortious conduct. 800 F.2d 356 (3d Cir. 1986). In *Kichline,* the court found that the plaintiff knew of his pulmonary condition and the possible cause of his injury, inhalation of diesel fumes at his workplace, before August 3, 1980, when the statutory limitation period began to run, and therefore held all claims prior to that date were barred. 800 F.2d at 358. The court further held that notwithstanding the above, the defendant's conduct could be characterized as a "continuous tort" and to the extent that his injuries were aggravated within the statutory period - they were not barred by the statute of limitations. *Id.* at 361.

Although the Second Circuit has not addressed this issue, other circuits, and district courts in the Northern District of

New York, have specifically rejected the argument that the continuing tort doctrine tolls the statute of limitations under FELA. *See Aparicio v. Norfolk & Western Ry.*, 84 F.3d 803, 815 (6th Cir. 1996) (affirming the district court's rejection of the Third Circuit's position in *Kichline,* and holding that the aggravation of "an original injury that is claimed to have been caused by an employer's negligence is not a severable action under [FELA]."); *Fries,* 909 F.2d at 1096 ("The tolling permitted by *Urie* only extends the limitations period to the date when the injury manifests itself, not beyond. . . . That defendant's injury had not reached its maximum severity . . . but continued to progress does not affect this result."); *Bealer v. Missouri Pac. R.R. Co.,* 951 F.2d 38 (5th Cir. 1991); *Anthony,* 1998 WL 696288, *6 (holding that the "fact that a plaintiff continues to suffer exposure to the allegedly tortious conduct does not toll accrual of his claim."); *Hitchock v. National R.R. Passenger Corp.,* 20 F. Supp. 2d 429, 432 (N.D.N.Y. 1998) ("That [the plaintiff's] condition may have worsened over time and become a serious problem only thereafter is not relevant."). In *Anthony,* the court explained:

> Under the discovery rule, accrual is postponed until "the plaintiff has or with reasonable diligence should have discovered the critical facts of both his injury and its cause." *Cf. Barrett v. United States,* 689 F.2d 324, 32[illegible] (2d Cir. 1982) (FTCA case). Thus, the rule benefits a plaintiff who is

> "blamelessly ignorant of the existence or cause of his injury." Id. (citing *Stoleson v. United States,* 629 F.2d 1265, 1269 (7th Cir. 1980)). However, the rule also imposes on an injured plaintiff an affirmative duty to investigate the facts of his injury and its cause once alerted by symptoms. *Fries,* 909 F.2d at 1095. "[T]o apply any other rule would thwart the purposes of repose statutes which are designed to apportion the consequences of time between plaintiff and defendant and to preclude litigation of stale claims." *Id.* (citation omitted).

1998 WL 696288 at * 6. In this case, the undisputed evidence shows that plaintiff possessed sufficient facts to allow him, in the exercise of reasonable diligence, to seek a diagnosis and investigate the cause of his symptoms prior to June 28, 1997. Thus, neither plaintiff's assertion that he was not told by his employer or a medical source that he had disabling hearing loss until April 2000, nor his averment that his hearing loss may have deteriorated to a disabling condition between 1997 and 2000, even if true, are relevant. *See Fries,* 909 F.2d at 1095 ("What the *Urie* Court did not do was provide an escape for plaintiff s who are aware [or should be aware] that some type of injury exists yet who choose to ignore it by failing to seek diagnosis and investigate the cause. . . . The tolling permitted by *Urie* only extends the

limitations period to the date when the injury manifests itself, not beyond.") (citation omitted). Accordingly, the continuing tort doctrine does not toll the accrual of plaintiffs claims.

IV. CONCLUSION

Therefore, because the undisputed facts reveal that plaintiff knew or, in the exercise of reasonable diligence, should have known of his injury and its cause not later than 1994, his claims are barred by FELA's three year statute of limitations, there is no genuine issue of fact to be decided, and summary judgment must be entered for defendant as a matter of law. Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is granted in its entirety; and it is further

ORDERED that the complaint is dismissed with prejudice; and it is further

ORDERED that the Clerk of the Court is directed to close this case.

IT IS SO ORDERED.

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Dated: September 12, 2002
Syracuse, New York

s/ Norman A. Mordue
Norman A. Mordue
United States District Judge